Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

COMMENTS OF
BONNEVILLE INTERNATIONAL CORPORATION

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Dated: January 2, 2003

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SUMMARY

In this proceeding, the Commission initiates a comprehensive review of its media ownership rules to determine whether they are "necessary in the public interest" in a media marketplace that has undergone dramatic change since the ownership rules were first adopted. Bonneville International Corporation ("BIC") demonstrates herein that it is time to eliminate the newspaper/broadcast cross-ownership rule. Further, BIC opposes the alternative "case-by-case" and "single local media ownership rule" regulatory approaches identified in the *Notice*.

In 2002, the D.C. Circuit issued two decisions making clear that the media ownership biennial review provision, Section 202(h) of the Telecommunications Act of 1996, carries with it a presumption in favor of repealing or modifying ownership rules and that any Commission decision to retain ownership rules must be based on a solid factual record. The record before the Commission fails to provide the evidentiary foundation required under Section 202(h) to warrant retention of the rule. In fact, the record as well as the Commission's recently released Media Ownership Working Group studies, support elimination of the rule. The Commission should eliminate the rule in all markets, as there is no evidence to warrant its retention, pursuant to Section 202(h), regardless of market size.

In addition, the alternatives to regulating media ownership identified in the *Notice* are problematic. The "case-by-case" approach lacks the certainty required in the media marketplace to plan financial transactions and would unnecessarily burden Commission resources. A "single local media ownership rule" moreover, is unworkable and unlikely to withstand judicial scrutiny. Both alternatives should be rejected.

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COMMENTS OF
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Bonneville International Corporation ("BIC") hereby submits its comments in the above-captioned proceeding, which incorporates the pending review of the newspaper/broadcast cross-ownership rule into a comprehensive rulemaking considering the Commission's media ownership rules.[1]

[1] *2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Dkt. No. 02-277, MM Dkt. Nos. 01-235, 01-317, 00-244, *Notice of Proposed Rulemaking,* 17 FCC Rcd 18503 (2002) ("*Ownership NPRM*").

INTRODUCTION

BIC is the operator of twenty radio stations and a television station located in the Chicago, Salt Lake City, San Francisco, St. Louis, and Washington, D.C. markets.[2] In Salt Lake City, BIC-affiliated common ownership of broadcast stations and a newspaper is "grandfathered" under the Commission's newspaper/broadcast cross-ownership rule.

In December 2001 BIC submitted comments in response to the *Newspaper/Broadcast Cross-Ownership Notice of Proposed Rulemaking* asserting that the rule must be eliminated.[3] The Commission incorporated the record of that rulemaking into the instant proceeding.[4] It is time to eliminate the rule. In the past year, the D.C. Circuit clarified the substantial burden the Commission must satisfy to retain any of its existing media ownership rules. The record developed in the *Newspaper/Broadcast Cross-Ownership Proceeding* demonstrates that no evidentiary foundation exists to overcome the presumption in favor of eliminating the rule. The Commission's Media Ownership Working Group studies provide further evidence that the Commission cannot sustain this rule. Accordingly, by these Comments, BIC (1) reiterates that the newspaper/broadcast cross-ownership rule must be promptly eliminated in all markets; and (2) opposes the "case-by-case" and the "single local media ownership rule" alternatives for regulating broadcast ownership identified by the Commission in the instant proceeding.

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[2] These stations are licensed to a BIC-affiliated company, Bonneville Holding Company.

[3] *Cross-Ownership of Broadcast Stations and Newspapers; Newspaper/Radio Cross-Ownership Waiver Policy*, MM Dkt Nos. 01-235, 96-197, *Order and Notice of Proposed Rulemaking*, 16 FCC Rcd 17283 (2001) ("*Newspaper/Broadcast NPRM*" or "*Newspaper/Broadcast Cross-Ownership Proceeding"*).

[4] *See Ownership NPRM*, 17 FCC Rcd at 18506, para. 7.

I. D.C. CIRCUIT DECISIONS IN *FOX TELEVISION* AND *SINCLAIR* ESTABLISH AN EXACTING STANDARD FOR COMMISSION REVIEW OF MEDIA OWNERSHIP RULES UNDER SECTION 202(h)

The Commission's biennial review of its ownership rules is undertaken pursuant to Section 202(h) of the Telecommunications Act of 1996, which states:

> The Commission shall review . . . all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest. [5]

In 2002, the D.C. Circuit issued two decisions reviewing the Commission's application of Section 202(h) to several media ownership rules. In both *Fox Television* and *Sinclair*, the court concluded that the Section 202(h) standard of review "carries with it a presumption in favor of repealing or modifying the ownership rules."[6] The court remanded or vacated each of the rules under review, finding that the Commission had failed to justify retention of any of the rules under the exacting standard Congress established. As the *Ownership NPRM* acknowledged, the court "faulted the Commission's justification of its rules as lacking supporting factual evidence."[7] The Commission rightly concludes that going forward, any decision to retain the existing rules must be based on empirical evidence and not mere conjecture.

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[5] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996) ("*1996 Act*").

[6] *Fox Television Station, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002), *rehearing granted,* 293 F. 3d 537 (D.C. Cir. 2002) ("*Fox Television*"); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002), *rehearing denied en banc*, 2002 U.S. App. LEXIS 16619 (D.C. Cir. 2002).

[7] *Ownership NPRM*, 17 FCC Rcd at 18511, para. 19 (citing *Fox Television*, 280 F.3d at 1041-44 and *Sinclair*, 284 F.3d at 163).

As discussed further below, application of the Section 202(h) standard of review compels repeal of the newspaper/broadcast cross-ownership rule because neither the FCC nor the rule's proponents can offer factual evidence that its retention is "necessary in the public interest."[8]

II. THE EXISTING RECORD COMPELS REPEAL OF THE NEWSPAPER/ BROADCAST CROSS-OWNERSHIP RULE

Prior to the instant proceeding, the Commission instituted three separate proceedings in the last six years to examine whether the newspaper/broadcast ban is still relevant in the current media marketplace.[9] To date, however, the Commission has not completed a comprehensive review of the rule. Nonetheless, these proceedings have produced an exhaustive record that demonstrates that the newspaper/broadcast cross-ownership rule is "no longer in the public interest."[10]

In the *Newspaper/Broadcast Cross-Ownership Proceeding,* BIC and others urged the Commission to repeal the rule in its entirety, noting that the landscape of the media marketplace has changed so dramatically since the rule was adopted that continued application no longer serves the public interest. The media marketplace has been marked by an explosion in the number and type of media outlets and distribution systems since the newspaper/broadcast cross-ownership rule was adopted in 1975.[11] Indeed, as the Commission has recognized, the number of television and radio stations has increased dramatically, cable television has progressed from its infancy to become a

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[8] *1996 Act* § 202(h).

[9] *Newspaper/Radio Cross-Ownership Waiver Policy,* MM Docket No. 96-197, *Notice of Inquiry*, 11 FCC Rcd 13003 (1996) ("*1996 Newspaper/Radio Inquiry"*); *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MM Docket No. 98-35, *Notice of Inquiry*, 13 FCC Rcd 11276 (1998) ("*1998 Biennial Review Broadcast Ownership Notice of Inquiry")*; *Newspaper/Broadcast NPRM.*

[10] *1996 Act* § 202(h).

significant medium for the delivery of television programming, DBS has become a strong competitor to cable in the multichannel video program distributor market, the number of video programmers has grown exponentially, and the Internet has become a compelling source of local and national information.[12] As a result, retention of the newspaper/broadcast cross-ownership ban under the auspices of enhancing diversity ignores the realities of today's media marketplace, where the public enjoys a plethora of diverse viewpoints from a vast array of media outlets. Instead, as BIC noted in its previous comments, the rule acts as an impediment to more effective public service and, indeed, places at risk the service now being provided by broadcasters and newspaper owners.

Many commenters in the *Newspaper/Broadcast Cross-Ownership Proceeding* demonstrated the negative public interest consequences of the rule.[13] Commenters also established that the rule unfairly and unreasonably discriminates against broadcasters and newspaper publishers and restricts their ability to compete in today's highly complex media marketplace.[14] In fact, the record developed in that proceeding is replete with factual evidence and empirical studies demonstrating that repeal of the newspaper/broadcast cross-ownership rule will have no effect on competition[15] or diversity.[16]

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[11] *See Newspaper/Broadcast NPRM* Comments of BIC at 2 (Dec. 3, 2001) ("Comments of BIC").

[12] *See Newspaper/Broadcast NPRM,* 16 FCC Rcd at 17288-89, paras. 9-13.

[13] *See, e.g.,* Comments of BIC at 7-8; *Newspaper/Broadcast NPRM* Comments of Tribune Company at 42-52 (Dec. 3, 2001) ("Comments of Tribune Co."); *Newspaper/Broadcast NPRM* Comments of West Virginia Radio Corporation at 32-34 (Dec. 3, 2001).

[14] *See e.g.,* Comments of BIC at 7-8; *Newspaper/Broadcast NPRM* Comments of the Newspaper Association of America at 108-11 (Dec. 3, 2001) ("Comments of NAA"); *Newspaper/Broadcast NPRM* Comments of the Journal Broadcast Corporation at 4-5 (Dec. 3, 2001) ("Comments of Journal Broadcast Corp.").

[15] *See* Economists Incorporated, *Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rules* (July 21, 1998), attached as Appendix B to *Newspaper/Radio Broadcast NOI* Comments of (continued…)

Moreover, the Media Ownership Working Group studies provide further evidence that the rule cannot be sustained under Section 202(h). For example, one study examining viewpoint diversity found that "the data suggest that common ownership of a newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary about important political events in the commonly owned outlets."[17] Another study examining media substitution concluded that for news consumption, consumers substitute between daily newspapers and the following: weekly newspapers; broadcast TV news; cable; and the Internet.[18] A third study reveals that network affiliates co-owned with newspapers experience "noticeably greater success" in terms of quality and quantity of local news programming as compared to other network affiliates.[19] In light of the D.C. Circuit's conclusion that Section 202(h) "carries with it a presumption in favor of

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NAA (examining 1400 daily newspapers and concluding that there is no evidence to suggest that cross-owned newspapers charge higher advertising prices than other newspapers); *Newspaper/Broadcast NPRM* Comments of Cox Enterprises, Inc. at 18-20 (Dec. 3, 2001) (showing that television advertising and newspaper advertising prices in markets with grandfathered newspaper/broadcast combinations are no higher than in markets without such combinations); *Newspaper/Broadcast NPRM* Comments of Schurz Communications at 9-10 (Dec. 3, 2001) (demonstrating that two grandfathered newspaper/broadcast combinations in South Bend, Indiana have not adversely affected the advertising market).

[16] *See* David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper/Broadcast Cross-Ownership,* 54 Fed. Comm. L. J. 31 (2001) ("*Pritchard Study*") (demonstrating that co-owned newspaper and broadcast properties maintain their autonomy and editorial independence); s*ee also Newspaper/Broadcast NPRM* Comments of Hearst-Argyle Television, Inc. at 15-16 (Dec. 3, 2001); Comments of Tribune Co. at 40-42; Comments of Journal Broadcast Corp. at 2-3; Comments of Media General, Inc. at 34-35 (Dec. 3, 2001); Comments of NAA at 41-43.

[17] David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign*, Discussion at 12 (2002).

[18] *See* Joel Waldfogel, *Consumer Substitution Among Media*, at 39 (2002).

[19] Thomas C. Spavins *et al., The Measurement of Local Television News and Public Affairs Programs,* Section I at 2, (2002).

repealing or modifying the media ownership rules," the studies confirm that the Commission cannot sustain the rule in today's media marketplace.

By contrast, proponents of the rule offer no probative evidence justifying retention of the rule. Their comments in the *Newspaper/Broadcast Cross-Ownership Proceeding* are conclusory and provide no factual basis or empirical evidence to overcome the presumption in favor of repeal.[20] Moreover, proponents fail to refute the evidence that suggests that the elimination of the newspaper/broadcast cross-ownership ban will provide diverse viewpoints and more locally oriented programming to the public.

III. THE COMMISSION SHOULD ELIMINATE THE NEWSPAPER/BROADCAST CROSS-OWNERSHIP RULE IN ALL MARKETS

Commission action to repeal the newspaper/broadcast cross-ownership rule must extend to all markets because the lack of empirical evidence necessary to retain the rule applies in large, medium and small markets alike. Simply put, applying the Section 202(h) standard of review reveals there is no basis to support retention of the rule in any market.

As an initial matter, markets of all sizes have experienced explosive growth in media outlets including cable, DBS, the Internet, and national and weekly newspapers. These additional outlets offer a multitude of sources for news, entertainment, and advertising in markets of all sizes. As a result, media substitutability by consumers extends to medium and small markets across the country.

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[20] *See Newspaper/Broadcast NPRM* Reply Comments of the National Association of Broadcasters at 18-23 (Feb. 15, 2002) (noting that proponents of the ban offer general criticisms which bear little direct relevance to newspaper/broadcast cross-ownership); *Newspaper/Broadcast NPRM* Reply Comments of Media General, Inc. at 16-29 (Feb. 15, 2002) (noting that proponents concerns regarding harm to institutional diversity and homogenized media content are conjectural and unsupported by the record); *Newspaper/Broadcast NPRM* Reply Comments of the Newspaper Association of America at 11-30 (Feb. 15, 2002) (noting that proponents fail to demonstrate that the ban will maintain competition or foster diversity).

In addition, newspaper/broadcast combinations would permit both newspapers and broadcasters, which are facing unprecedented competition in the digital environment, to maintain their financial viability and to strengthen their operations, particularly in medium and small markets. Indeed, radio stations, television stations and newspapers face significant challenges that threaten their very ability to survive let alone to continue to provide the important public service that they bring to their respective communities. It is medium and small market broadcasters and newspaper publishers, and their respective communities, that are most in need of regulatory relief and who would experience the greatest benefits from eliminating the rule. Complete repeal of the rule is the only way to accord all broadcasters and newspaper publishers fair and equitable treatment. Only a complete and total repeal of the newspaper/broadcast cross-ownership rule for *all* markets will suffice.

IV. THE ALTERNATIVE APPROACHES IDENTIFIED FOR THE REGULATION OF MEDIA OWNERSHIP SHOULD BE REJECTED

In the *Ownership NPRM* the Commission acknowledges that the record may demonstrate that the current media rules "are no longer necessary to actually serve" the public interest.[21] It then seeks comment on alternative approaches to regulate media ownership so as to promote competition, diversity, and localism.[22] Neither the "case-by-case" approach nor the "single local media ownership rule" identified by the Commission is an appropriate or workable means to regulate media ownership.

[21] *Ownership NPRM*, 17 FCC Rcd at 18535, para. 106.

[22] *Id*.

A. The "Case-By-Case" Approach

A case-by-case approach to regulating media ownership transactions would be problematic on several levels. As an initial matter, such an approach is indefinite and lacks the certainty required in the media marketplace to effectively plan financial transactions. Moreover, it is administratively burdensome and would without doubt lead to extended, resource-intensive, fact-finding undertakings by the Commission that result in case-specific findings and decisions of limited applicability. BIC submits that such an approach will necessarily result in a substantial drain on Commission resources, lengthy processing delays for applicants, and significant transaction costs as the marketplace will have no certainty regarding FCC treatment of potential transactions.

In considering the regulation of media ownership in the past, the Commission time and again has concluded that a case-by-case approach disserves the public interest. For example, when the Commission revised the television duopoly rule in 1999, it adopted a bright-line test rather than general waiver criteria because bright-line tests "bring certainty to the permissibility of . . . transactions and expedite their consummation."[23] The Commission again rejected a case-by-case review approach when it modified its attribution rules that define what constitutes a cognizable interest in the application of the broadcast multiple ownership rules.[24] The Commission (on

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[23] *Review of the Commission's Regulations Regarding Television Broadcasting*, MM Dkt. 99-221, *Report and Order,* 14 FCC Rcd 12903,12933, para. 64 (1999), reconsideration granted in part and denied in part, *Memorandum Opinion and Second Order on Reconsideration*, 16 FCC Rcd 1067 (2001); *See also Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Reform Act Provisions of the Telecommunications Act of 1996: Review of the Commission's Cable Attribution Rules*, CS Dkt. Nos. 98-82, 96-85, *Report and Order*,14 FCC Rcd 19014, 19050, para. 92 (1999) ("[A] bright-line . . . test is superior to a case-by-case analysis because it permits the planning of financial transactions and minimizes regulatory costs."). Of course, any bright-line test must be subject to an appropriate waiver standard. *See*, *e.g.*, *Wait Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972).

[24] *Review of the Commission's Regulations Regarding Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry;* (continued…)

reconsideration) noted that a bright-line rule provides regulatory certainty and eases application processing.[25] To ensure regulatory certainty, ease administrative burden and expedite processing media transactions, BIC urges the Commission to reject any case-by-case approach to regulating media ownership.

B. The "Single Local Media Ownership Rule"

The use of a single local media ownership rule to regulate future media transactions suffers from different but equal infirmities. According to the *Ownership NPRM*, the use of a single local media ownership rule contemplates a rule that is applicable to all or some media outlets and that is dependent upon the number of independent voices in the market or a percentage cap limiting the number of media outlets one entity could own in a market.[26] The Commission is also considering weighting the voices of different types of media to the extent they are relied upon differently by consumers, advertisers, and program producers.[27] These approaches are unworkable and unlikely to withstand judicial review.

The use of a single local media ownership rule is unworkable because of the difficulty inherent in determining the number and types of outlets that must be included under such a rule, and

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Reexamination of the Commission's Cross-Interest Policy, MM Dkt. Nos. 94-150, 92-51, 87-154, *Report and Order*, 14 FCC Rcd 12559, 12610, para. 115 (1999).

[25] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment In the Broadcast Industry and Reexamination of the Commission's Cross-Interest Policy*, MM Dkt 94-150, *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd 1097, 1121, para. 54 (2001) (rejecting case-by-case review because such an approach might lead to lengthy fact-specific decisions of limited applicability and substantial processing difficulties and delays, thus impeding its goal of rapidly reviewing transactions).

[26] *Ownership* NPRM, 17 FCC Rcd at 18538-39, paras. 109-111.

[27] *Id.* at 18539, para. 112.

how such outlets should be weighted. In addition, a rule that relies upon a weighted voice test cannot accurately measure how particular media outlets promote diversity, competition, and localism and cannot respond to technological or competitive developments in the marketplace. Further, because a single ownership rule affects only those entities that own a broadcast station, broadcasters' ability to compete would be significantly impaired. Moreover, any single ownership rule would necessarily include restrictions on cable and broadcast ownership in the same market, thus raising serious legal implications.[28] Finally, given the significant difficulties in crafting such a rule it is likely that the rule would not withstand judicial scrutiny. The attendant variables which must be considered in a single local media ownership rule simply make the approach unmanageable.

[28] *See Fox Television*, 280 F.3d at 1027 (vacating the cable/broadcast cross-ownership rule).

CONCLUSION

For the foregoing reasons, BIC urges repeal of the newspaper/broadcast cross-ownership rule in its entirety. BIC further submits that the uses of a "case-by-case approach" or a "single local media ownership rule" are inappropriate methods by which to regulate media ownership.

Respectfully submitted,

BONNEVILLE INTERNATIONAL CORPORATION

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Dated: January 2, 2003